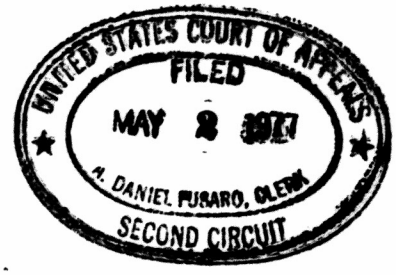
United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

76-7452



United States Court of Appeals For the Second Circuit

GERTRUDE J. BONIME and LILLIAN OLDEN,
Plaintiffs-Appellees,

v.

JOHN C. DOYLE, WILLIAM M. WISMER
and CANADIAN JAVELIN LIMITED,
Defendants-Appellees,

v.

GUARDIAN MANAGEMENT, S.A.,
Claimant-Appellant,

SAMUEL H. SLOAN,
Member of the Class-Appellant.

PETITION FOR REHEARING AND SUGGESTION
THAT THE REHEARING BE EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Gertrude J. Bonime and Lillian Olden Plaintiffs-Appellees, v. John C. Doyle, William M. Wismer and Canadian Javelin Limited, Defendants-Appellees, v. Guardian Management, S.A., Claimant-Appellant, Samuel H. Sloan, Member of the Class-Appellant.	No. 76-7452

PETITION FOR REHEARING AND SUGGESTION THAT THE REHEARING BE EN BANC.

PRELIMINARY STATEMENT

On April 6, 1977 a panel of this Court consisting of Oakes, Circuit Judge, and Wyzanski and Holden, District Judges, affirmed by summary judgment a decision of the United States District Court for the Southern District of New York. The decision of this Court was as follows:

> "ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of Judge Lasker below, approving the settlement, Bonime v. Doyle, 416 F. Supp. 1372 (S.D.N.Y. 1976), be an it hereby is affirmed. In reviewing the appropriateness of a settlement approval, the appellate court may, and should, intervene only "upon a clear showing that the trial court was guilty of an abuse of discretion." State of West Virginia v. Chas. Pfizer & Co., 440 F. 2d 1079, 1085 (2d Cir.), cert. denied

sub nom. Cotler Drugs v. Chas Pfizer & Co., 404 U.S. 871 (1971). On this standard Judge Lasker's evaluation of the proposed settlement, which required an "amalgam of delicate balancing, gross approximations and rough justice," City of Detroit v. Grinnell Corp., 495 F. 2d 448, 468 (2d Cir. 1974), was plainly sufficient and proper."

This appellant respectfully urges that the above decision is contrary to the law of this Circuit. Accordingly, appellant petitions for a rehearing and suggests that the rehearing be en banc.

ARGUMENT

The case presented here involves a class action brought in behalf of a class of all purchasers of Canadian Javelin Ltd. stock from April 30, 1969 through October 24, 1973. The complaint which was filed on December 3, 1973 alleged various counts of securities fraud. The allegations of the complaint paralleled those made in a complaint filed by the S.E.C. four days earlier. See S.E.C. v. Canadian Javelin Ltd., 73 Civil 50 [illegible] S.D.N.Y.).

After plaintiff's counsel had taken four depositions, counsel for the parties agreed to follow what Judge Lasker observed was, in effect, a "tentative settlement class" procedure. 416 F. Supp. at 1379. Counsel for the plaintiff class made a Rule 23 motion for a class action determination and counsel for the defendants counsented to the class action determination on condition that the determination be preliminary and they reserved the right to petition the court to alter, amend or revoke that determination. The motion for a class action determination was then granted "on consent." 416 F. Supp. at 1375. Notice to the class was stayed pending further discovery, Id. Thereafter, a proposed stipulation of settlement was submitted to the Court for approval. At that point the Court directed that notice of both the class action determination and the proposed settlement be sent to the class members.

This notice gave all class members the choice of either (1) opting out, (2) objecting to the settlement or (3) filing a proof of claim and participating in the settlement if it was approved. This appellant chose to object.

After eight months of deliberation, Judge Lasker decided to approve the proposed settlement. An interlocutory judgment was entered approving the settlement but leaving undetermined such matters as the amount of the fee to be paid to plaintiff's counsel. This appellant and two others appealed from this interlocutory judgment.

Among the questions presented in this appeal is the question of the propriety of the use of the tentative settlement class procedure in a routine securities fraud case such as this. This question has been the subject of debate in the legal profession. The Manual for Complex Litigation, published under the imprimatur of numerous federal judges, including Judge Feinberg of this Court, devotes considerable attention to the tentative settlement class procedure and to the abuses it fosters and concludes that tentative settlement classes "should never be formed." Manual for Complex Litigation, paragraph 1.46, pt. I, n. 17, p. 43. However, the May, 1976 Harvard Law Review devotes 6 pages to a discussion of this procedure and fails to reach the same conclusion. Instead, the Harvard Law Review argues that in cases when "all class members have individually recoverable claims, a tentative settlement class may be acceptable." See "Developments in the Law -- Class Action," 89 Harv. L. Rev. 1318, 1557 (1976).

In the case presented here, none of the class members, with the exception of this appellant and a handful of others who have filed proofs of large claims, have claims which can be said to be individually recoverable. The remainder

of the class consists of approximately 3500 small investors, the vast majority of whom have a stake in this controversy amounting to less than $1000. The claims of these investors are obviously too small to justify the hiring of counsel to examine the record including the stipulation of settlement, to submit written objections to the settlement and to appear at the hearing on the proposed settlement, all of which were required, according to the briefs for the appellees,[1] if a class member wished to object to the proposed settlement. It is even more obvious that a small claimant would not be in the financial position to appeal to this Court from an approval of the settlement by the District Court. Thus it is clear that the vast majority of members of the class do not have individually recoverable claims. cf. Brick v. CPC International, Inc., 547 F. 2d 185, 186 (2d Cir. 1976).

It is clear from the Manual for Complex Litigation, from the May, 1976 Harvard Law Review, and from every reported opinion which has dealt in detail with this question that in class actions with a large number of claimants each possessing a relatively small claim, the tentative settlement procedure should not be allowed. If it were otherwise, collusive lawsuits which benefit nobody other than the attorney bringing them[2] would become the order of the day. For this reason, it is rather shocking that this Court chooses to issue a three sentence summary order to dispose of this appeal in such a way as in effect to

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1 See e.g. brief for plaintiff-appellees pp. 13 and 26; brief for defendants-appellees p. 11-13.

2 This is essentially the case here since most members of the class continue to hold to present their shares of Canadian Javelin Ltd. This led several objectors to protest at the hearing that the proposed settlement would do nothing more than take money out of one pocket and put it into another after, of course, the deduction of $260,000 counsel fees for plaintiff's attorney.

overrule a great body of judicial authority.

The reliance by this Court on the two cases it cites is clearly misplaced. Both cases were of monumental complexity and were brought by governmental entities and major corporations, all of whom had a large stake in the controversy and who possessed the financial resources to retain the most highly qualified counsel. The first of these, State of West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), involved some 66 civil actions, all of which were consolidated by the Judicial Panel on Multi-district Litigation. In the consolidated case, the plaintiffs included all of the states of the United States as well as most of the major corporations in America dealing in the wholesale or retail ethical drug business. After extensive pre-trial proceedings the Pfizer defendants made a $100 million settlement offer. This offer was accepted by almost all of the plaintiffs and was approved by the Court over a handful of objections. 440 F.2d at 1085. This Court affirmed. In the second case, City of Detroit v. Grinnell Corp., 495 F. 2d 448 (2d Cir. 1974), which was also a consolidated case, the view has been expressed that this case was potentially the most complex lawsuit in the history of the federal judicial system. The district judge estimated that it would take from 5 to 11 years to try. City of Detroit v. Grinnell, 356 F. Supp. 1380, 1389 (S.D.N.Y. 1972) supra, 495 F. 2d at 457. The plaintiff class included some of the world's largest corporations as well as numerous governmental entities. The quality of the representation the objectors could financially afford to retain did not pose a problem, to say the least.

The case presented here is in no way comparable to the massive lawsuits just discussed. Judge Lasker made this clear in his own remarks on July 23, 1976, shortly after he rendered the [illegible] approving the settlement and before he

entered the judgment from which this appeal was taken. On that occasion he stated:

> "THE COURT: It isn't that the Court has committed itself to anything, because I do not think that setting a matter down for a hearing on a proposed settlement indicates in the slightest that the Court thinks that the settlement is fair or feasible. The whole purpose of the hearing is to hear what it is all about and determine whether it is fair or feasible.
>
> The one thing I will agree with you about is that Judges like to see cases settled and, therefore, they may have a tendency to be unhappy when somebody opposes a settlement, but not because they have committed themselves in advance to a particular form of settlement.
>
> And I may say that the settlement of this case has been much more difficult for me than if I tried the bloody thing. I could have tried it in two or three weeks and finished.
>
> MR. GOLOMB: Except the question of damages, which you maight have had a problem with.
>
> THE COURT: I would have left it to a jury."

See Transcript of oral Argument of July 23, 1976 p. 50; Joint Appendix p. A355.

In view of Judge Lasker's statement that he could have tried the case on the merits in two or three weeks, the eight months he took to decide whether to approve the settlement was self-evidently a poor expenditure of judicial time. Moreover, one month passed between Judge Lasker's decision and the entry of the judgment and another eight months passed from then until the date of this Court's decision. Worse yet, the matter is far from concluded. If it is necessary for this appellant to petition for a writ of certiorari, a prospect which appears likely at the moment, at a minimum several months will pass before that is resolved and assuming that certiorari is denied the case will be back in the district court for a new round of hearings on (1) the application by plaintiffs counsel for attorneys fees and (2) the requests by those entities whose claims have been rejected for participation in the settlement. After those hearings,

further appeals will almost certainly result. For one, Guardian Management Corp., which has already filed a notice of appeal, will be appealing unless Judge Lasker overrules the decision of plaintiff's counsel to reject Guardian's proof of claim. Guardian was originally a participant in the instant appeal but all of the parties to this appeal, with the exception of this appellant, signed a stipulation allowing Guardian to withdraw its appeal with the right to reinstate its appeal at a later date. This stipulation was approved by Judge Mulligan. Guardian has indicated that it will raise a number of issues on appeal including several issues raised by this appellant.

In short, it will be at least a year and perhaps much longer before any funds will be available for distribution to the members of the class. Clearly, it would have been better for Judge Lasker to have tried the case in two or three weeks as he could have done in July, 1975 when the settlement was first proposed.

If the present decision is allowed to stand, and assuming it can be taken to accurately state the law of this circuit, the result will be to encourage the bringing of meritless class action suits and to encourage settlements to the point of removing any incentive to the plaintiff's counsel to litigate class actions to their conclusion. In the instant case, plaintiff's counsel is applying for a fee of $260,000 which is as much as it could expect to receive even if it recovered judgment after a trial. At the same time, the terms of the judgment give the defendants total immunity from suit on the part of any purchaser of Canadian Javelin Ltd. stock during the four and one half year class action period based upon any cause of action "whether known or unknown." See Notice, Joint Appendix p. A144.

In TMT Trailer Ferry Inc. v. Anderson, 390 U.S. 414, 424-425 (1968),

a bankruptcy case which is relied upon in State of West Virginia v. Chas. Pfizer & Co., supra, 440 F.2d at 1079, the Supreme Court discussed the law of settlement as follows:

> "...the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."

Thus it is clear that a case should not be settled where the settlement will cause more problems for the judge and more expenditure of judicial time than if the case were fully litigated. This is particularly true of a class action involving as it does the problem of absent plaintiffs and many other problems inherent in a class action. The Manual for Complex Litigation paragraph 1.45 p. 37 expresses this point as follows:

> "According to the weight of recent decision, this right of the small claimant to benefit without alone bearing the otherwise prohibitive cost of litigation is the most important procedural right secured by Rule 23. (citations omitted) The requirement of "opting-in" must, therefore, under Rule 23 as it is presently written, be regarded as a clear abuse of discretion. (citation omitted) ("Rule 23(e) places on the court the responsibility of protecting the absent parties.") Requiring a proof of claim under pain of exclusion or dismissal is the same thing as requiring class members to opt in."

If this Court chooses to overrule the body of judicial authority just discussed, it should at least write an opinion explaining why it does so. Due to the inherent nature of the tentative settlement class procedure, most cases in which this procedure is followed will never reach the appellate stage. Most parties who do not like the use of this procedure will opt-out rather than stay in the class and object. Those objectors whose objections are overruled will in most cases not be in the financial position to appeal. And those few who do appeal can easily

be bought off by the parties to the suit. In this case, for example, three appeals were filed. One was filed by an attorney who had objected most vigorously in the district court, the motivation behind his objection being that he sought to represent the same class of plaintiffs in two similar class actions he had instituted in Chicago. This attorney wanted to upset the settlement here so that he could get a higher settlement in Chicago and an attorney's fee as well. After the Notice of Appeal was filed here, the Chicago attorney agreed to a stipulation which enabled him to earn an attorney's fee on the same pro rata basis as counsel representing the Bonime plaintiffs in the instant case. On this basis his appeal was withdrawn. The second appeal was filed by Guardian Management Corp. In that instance, a stipulation was later entered into which had the effect of allowing Guardian to postpone its appeal until a later day. That left only this appellant.

Indeed, the appeal by this appellant was very nearly settled. This appellant was willing to agree to the same terms and conditions as the stipulation with Guardian. However, plaintiff's counsel tried to defeat this appellant by pretending to be negotiating a settlement up until the eleventh hour in the apparent hope that this appellant's appeal would be dismissed for failure to file a brief on time. This plan nearly worked because, due to the refusal of plaintiff's counsel to serve appellant or provide him with copies of the pertinent papers filed in the district court, this appellant did not and could not file a brief and appendix until four days after the time to file. Plaintiff's counsel then asked this Court to dismiss appellant's appeal for that reason. In his affidavit to this Court, appellant's counsel falsely claimed that no settlement negotiations had taken place. Fortunately, this attempt to win this appeal by trickery failed. Later, counsel for plaintiff found that he needed

an extension of time to file his brief. This time he turned the tables around with a different falsehood. He claimed that appellant had made an offer of settlement, that plaintiff's counsel had accepted his offer and that then, a few days before the appellees' briefs were due, appellant had renegued on his offer. That this statement was an outright lie should be apparent from the affidavits filed in this Court. Appellant set forth his settlement offer not only in his brief but in an affidavit filed as early as November 24, 1976 in support of a motion for a summary reverse order. In order to believe Mr. Kornreich's and Mr. Wolf's claim that they first learned of appellant's settlement offer after appellant had filed his brief, one would have to believe, among other things, that they never read the papers which this appellant filed in Court. Of course, the truth is that once this appellant had gone through the pain, agony and suffering required to file his brief not to mention the time, effort and expense involved, he lost most of his interest in settling this case. After appellant had filed his brief he left for Europe immediately and the only time a settlement was discussed thereafter came when one of the attorneys in the case called him and said that Mr. Wolf was now willing to settle if only this appellant would pay Mr. Wolf approximately $100, which was the amount of his bill for the Joint Appendix. Although Mr. Wolf was apparently willing in a pinch to forego the $100, no offer was made to pay appellant's costs which then amounted to approximately $600. Appellant's response to this overture should be obvious.

Of course, the point all this is not that Mr. Wolf and Mr. Kornreich are both liars but that it is clearly erroneous for the appellate courts to permit a procedure where a relatively trivial sum of money like $100 could become the focal point in negotiations in a case affecting the rights of 3500 class members where the court has approved a $1,350,000 settlement offer. The fact that

this consideration has existed in this case and is likely to exist in an appeal in any similar case is sufficient grounds in itself to require a reversal of this Court's opinion.

Unfortunately, this case had one development which may have contributed to this Court's summary determination of important issues. After appellant filed his brief he went to England and from there to the Soviet Union (Armenia), Iran and Afghanistan. In Armenia telephone communications with the United States proved impossible. Later, in Iran, appellant had someone in his office call the office of the Clerk of the Court of Appeals to inquire when the oral argument would be. This call took place on or about March 7, 1977 and the caller was told that all arguments had been scheduled through Friday, April 15 and this case was not among them. On the basis of this, appellant went to Afghanistan, where reliable communications systems are unavailable, and did not return to the United States until Sunday, April 17. Unfortunately, appellant's information proved to be incorrect as the oral argument was in fact scheduled for April 4. Appellant, who did not know about the oral argument, did not appear.[3] Appellant has come from such places as Iceland and Haiti to argue appeals before this Court and would have come from Afghanistan for the oral argument, as the Clerk of the Court undoubtedly well knows. In this case, where the briefs leave unresolved a

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3 Appellant has attempted to reconstruct why this misunderstanding occurred. In all probability, when the call was made the regular docket clerks handling this case were out to lunch or otherwise unavailable and whoever took the call was unfamiliar with the case and did not know that Bonime v. Doyle, which bears docket no. 76-7452, was consolidated with Sloan's appeal, which was assigned docket no. 76-7506.

number of important factual questions, oral argument clearly would have been beneficial and might well have brought about a different result.

CONCLUSION

Appellant submits that for the foregoing reasons this petition for a rehearing should be granted and because of the importance of the legal issues involved the rehearing should be en banc.

Respectfully submitted,

Samuel H. Sloan

Dated: New York, New York
April 22, 1977

SLOAN Sim Bonime v. Sloan

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and res'des at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 23 day of April 1977 deponent served the within **Petition** upon

Wolf, Popper, Ross, Wolf & Jones, Esqs.;
Diamond & Golomb, Esqs.;
Moses Krislov, Esq.

attorney(s) for

Responents

in this action, at

845 Thidd Ave., NYC;
99 Park Ave., NYC and
800 Engineers Bldg., Cleveland, Ohio

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

ROBERT BAILEY

Sworn to before me this 23 day
April 1977

[illegible]
Notary Public, State of New York
Qualified in Richmond County
Commission Expires March 30, 1978